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STATE OF MICHIGAN

IN THE SUPREME COURT

MAYOR OF THE CITY OF LANSING,
CITY OF LANSING & INGHAM COUNTY
COMMISSIONER LISA DEDDEN,

Appellees/Cross-Appellants,

-vs-

MICHIGAN PUBLIC SERVICE COMMISSION
& WOLVERINE PIPE LINE COMPANY,

Appellants/Cross-Appellees.
_____/

Supreme Court No. 124136

Court of Appeals No. 243182

MPSC Case No. U-13225

MAYOR OF THE CITY OF LANSING
AND CITY OF LANSING
APPELLEES & CROSS-APPELLANTS'
RESPONSE BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE QUESTION PRESENTED[1]

MUST WOLVERINE PIPE LINE OBTAIN LOCAL CONSENT AS REQUIRED PURSUANT TO MCL 237.183(1)?

The City of Lansing answers "Yes."

Wolverine Pipe Line answers "No."

The Court of Appeals answers "Yes."

The MPSC did not answer this question.

[1]This question is a subpart of the City of Lansing's second question in its initial brief. The City's response brief is more narrowly focused because Wolverine agreed with the City's position on its first question presented and only addressed this subpart of the second question in its opening brief.

ARGUMENT

WOLVERINE PIPE LINE MUST OBTAIN LOCAL CONSENT AS REQUIRED PURSUANT TO MCL 237.183(1).

A. The Statutory Text Supports The Court Of Appeals Decision That Wolverine Pipe Line Must Obtain Local Consent From The City Of Lansing Before Commencing Construction Of A Pipeline Within The City's Borders.

Wolverine Pipe Line concedes, as it must, that it is a "public utility" within the meaning of MCL 247.183(1). (Wolverine Pipe Line's Brief On Appeal, pp 8-9). But it insists that it is not governed by that provision because it also satisfies the definition of "public utility" in 23 CFR 645.105. Wolverine argues that the two provisions of the statute are parallel and mutually exclusive. In other words, Wolverine takes the position that if a utility satisfies the definition of 23 CFR 645.105 and is constructing a project which is longitudinally within a limited access highway right-of-way, it is subject only to the requirements of MCL 247.183(2) and is excluded from the requirements of MCL 247.183(1).

This argument requires the Court to ignore language in subsection (1) that specifies that its provisions apply "including, subject to subsection (2), longitudinally within limited access highway rights-of-way." It also creates a constitutional conflict between the statute and the Michigan Constitution, which requires local consent before a corporation has the right to use the highway of a city for pipes. Const 1963, art 7, § 29.

Careful textual analysis confirms that the Court of Appeals correctly ruled that local consent is required. MCL 247.183(1) provides:

> Telegraph, telephone, power, and other public utility companies, cable television companies, and municipalities may enter upon, construct, and maintain telegraph, telephone, or power lines, pipe lines, wires, cables, poles, conduits, sewers or similar structures upon, over, across, or under any public road, bridge, street, or public place, including, subject to subsection (2), longitudinally within limited access highway rights-of-way, and across or under any of the waters in this state, with all necessary erections and fixtures for that purpose. A telegraph, telephone,

> power, and other public utility company, cable television company, and municipality, before any of this work is commenced, shall first obtain the consent of the governing body of the city, village, or township through or along which these lines and poles are to be constructed and maintained.

This provision allows a public utility company, such as Wolverine Pipe Line, to "enter upon, construct, and maintain ... pipe lines ... upon, over, across, or under any public road ..., including, subject to subsection (2), longitudinally within limited access highway rights-of-way... with all necessary erections and fixtures for that purpose." In other words, it permits a pipe line company to build a pipe line under a public road including when the pipeline lies longitudinally within a limited access highway right-of-way. But it requires that pipeline company to do so "subject to subsection (2)." Thus, Wolverine is governed by the requirements of both subsections.

Contrary to Wolverine's position, the Court of Appeals did not "bootstrap" subsection (2) into subsection (1). (Wolverine Pipe Line Brief on Appeal, p 12). Instead, the text of subsection (1) and subsection (2) are meant to apply. The term "including ... longitudinally within limited access highway rights-of-way" makes that clear. Wolverine's discussion actually lends further support to the City of Lansing's position on this point. Wolverine defines "subject to" to mean "under the domination, control, or influence of something...." (Wolverine Pipe Line Brief on Appeal, p 12). Yet, Wolverine ignores the word "including" that precedes the phrase "subject to." When the word "including" is not ignored but is read in conjunction with the rest of the text, the statute reads as follows:

> Telegraph, telephone, power, and other public utility companies, cable television companies, and municipalities may enter upon, construct, and maintain telegraph, telephone, or power lines, pipe lines, wires, cables, poles, conduits, sewers or similar structures upon, over, across, or under any public road, bridge, street, or public place, including *those under the control of*[2] *subsection (2),*

[2]This is the meaning of "subject to" as defined by Wolverine.

> longitudinally within limited access highway rights of way, and across or under any of the waters of this state, with all necessary erections and fixtures for that purpose.

Thus, subsection (1) specifically incorporates those public utilities that are under the control of subsection (2). Wolverine's argument requires the court to ignore this language. The Court of Appeals correctly refused to do so, and its decision should be affirmed. (Court of Appeals Opinion, p 7; Apx 45a).

Wolverine's reading of MCL 247.183 also ignores the text of MCL 247.185. That section provides:

> Sec. 15. The construction and maintenance of all such telegraph, telephone and power lines, cable television lines, pipe lines, wires, cables, poles, conduits, sewers and like structures shall be subject to the paramount right of the public to use such public places, roads, bridges, and waters, and shall not interfere with other public uses thereof and nothing herein contained shall be construed to authorize any telegraph, telephone, power, or other public utility company, cable television company or municipality to cut, destroy, or in anywise injure any tree or shrub planted within any highway right of way or along the margin thereof, or purposely left there for shade or ornament or to bridge across any of the waters of this state. Nor shall anything in this section or sections 13 and 14 be construed to grant any rights whatsoever to any public utilities or cable television companies whatsoever, nor to impair anywise any existing rights granted in accordance with the constitution or laws of this state, but shall be construed as a regulation of the exercise of all such rights. [MCL 247.185.]

This provision underscores the legislature's recognition that these statutes were not intended to grant rights to public utilities but to regulate the exercise of such rights and to do so in accord with existing rights granted in accordance with the constitution, which includes the rights of a city to grant or deny its consent to a pipe line project within its borders.

Wolverine spills a lot of ink discussing other ways in which the legislature could have worded the statute to accomplish its goal. (Wolverine Pipe Line Brief on Appeal, pp 12-13). But Wolverine's approach, based on hypothesizing alternative statutes and using them to narrow or alter the reading of the enacted text, was properly rejected below and provides no grounds for

a reversal on appeal. Justice Scalia once explained that "our job is not to scavenge the world of English usage to discover whether there is any possible meaning of [a statutory term] which suits our preconception ...; our job is to determine ... the ordinary meaning ...." *Smith v United States*, 508 US 223, 242; 113 S Ct 2050; 124 L Ed 2d 138 (1993) (Scalia, J, dissenting), as quoted in William D Popkin, *Statutes In Court: The History and Theory of Statutory Interpretation*, 180 (1999). That comment is especially apt here and underscores the problem with Wolverine's approach.

This Court analyzes the text as it was enacted. See *Pohutski v City of Allen Park*, 465 Mich. 675; 641 NW2d 219 (2002). When faced with questions of statutory interpretation, the reviewing court's obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. *Id.* at 686. The reviewing court gives the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. *Id.* Where the language is unambiguous, the reviewing court presumes that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. *Id.* Similarly, the reviewing court may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. *Id.*

These principles apply here and support the Court of Appeals' reading of the statute. The language is unambiguous: subsection (1) explicitly states that it applies to those entities subject to subsection (2). Wolverine Pipe Line has not been able to create any ambiguity in that text—because there is none. It's effort to "scavenge" the world for other wordings in an effort to conjure up an ambiguity was properly rejected below and should not long deter this Court from an affirmance.

Wolverine's parallel-form argument also provides no grounds for reversal. Wolverine argues that the two provisions are parallel, and thus entities fitting into subsection (1) are excluded from subsection (2). Wolverine points out that both provisions contain enabling language, which provides that the utility may "enter upon, construct, and maintain "facilities in specified locations under certain conditions. (Wolverine Pipe Line Brief on Appeal, p 14). From this Wolverine concludes that applying local consent to utilities that fall within subsection (2) renders the first sentence of subsections (1) and (2) redundant. But the two sentences are not redundant. Each provides enabling language for a specified type of utility if that utility satisfies the criteria provided for in the subsection. The repetition of a phrase "may enter upon, construct, and maintain" in two separate provisions does not require treating it surplusage or rendering it nugatory. It must be given effect in each.

Wolverine suggests that some utilities within the meaning of 23 CFR 645.105(m) may not constitute a "public utility company" within the meaning of MCL 247.183(1). The City of Lansing does not concede this point but it is unnecessary to a resolution of this appeal. If Wolverine is correct, the fact that the two categories may each have some entities that fall outside the scope of the other provides an additional reason for the legislature to repeat the enabling language authorizing such entities to proceed. In other words, if Wolverine is correct and some entity falls within subsection (2) without falling within subsection (1), then that entity might not be subject to the local consent requirement as a matter of statutory interpretation.[3]

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[3]Wolverine's argument raises the possibility that some hypothetical entity would fall outside of subsection (1), a point that the City does not concede. If so, Wolverine does not address whether the constitutional provision would apply to this hypothetical entity, and thus require local consent as a matter of constitutional law, regardless of the language of the statute as applied in such a circumstance. But these hypotheticals go beyond the issues presented in this appeal and need not be addressed until some future appeal, in which the issues are more precisely presented for decision.

Here, in any event, Wolverine has conceded that it falls within both categories of public utilities—so this argument does not help it in its effort to avoid obtaining local consent.

Wolverine's reading raises other problems as well. First, such a reading requires the court to ignore the word "including" in subsection (1), a phrase that clearly indicates that entities constructing longitudinally within the limited access highway rights of way are encompassed within subsection (1)'s list of entities and are governed by the provision. Second, it requires the court to ignore the phrase "subject to subsection (2)" in subsection (1), a second phrase that indicates that entities governed by subsection (2) are also encompassed within the text of subsection (1). Third, it reads the statute to create a conflict with the Michigan Constitution, which requires local consent for a utility to build pipe lines on or under the highway of a city. Const 1963, art 7, § 29. Fourth, it ignores the statute's history, which reveals a change in wording to include entities building in limited access highways within the reach of subsection (1). Fifth, it fails to take into account other provisions of the entire statute. See MCL 247.171 et seq.

Justice Scalia taught that the proper interpretation of a statute is that which is "(1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated - a compatibility which, by a benign fiction, we assume Congress always has in mind." *Green v Bock Laundry Machine Co*, 490 US 504, 507; 109 S Ct 1981; 104 L Ed 2d 557 (1989) (Scalia, J, concurring in the judgment). When interpreting a statute using a textualist approach, the court must consider how the possible meanings fit the statute as a whole. See e.g., *Chan v Korean Air Lines, Ltd*, 490 US 122, 127, 134-135; 109 S Ct 1676; 104 L Ed 2d 113

(1989). If a reading renders other provisions duplicative or superfluous, then the court should read the provisions together.

Here, the structural approach supports the Court of Appeals ruling because it gives effect to each word without creating any conflicts. In contrast, Wolverine's reading requires this Court to read "including" to mean "excluding." Such a reading is contrary to any proper textual approach because it requires the court to ignore the plain and unambiguous meaning of the words. And Wolverine's approach creates a conflict between the statute and constitution. For all of these reasons, the Court of Appeals correctly concluded that MCL 247.183(1) requires local consent and governs Wolverine Pipe Line's effort to construct a pipe line through the City of Lansing.

B. The Statute's History Supports The City Of Lansing's Position.

Wolverine also presents this Court with a legislative history argument that provides no grounds for a reversal. Wolverine insists that when the legislature amended MCL 247.183 in 1994, it intended to enable utilities that satisfy the definition of "utility" as set forth in 23 CFR 645.105(m) to "use limited access highways upon permission from the state in conformance with federal regulations." (Wolverine Pipe Line Brief on Appeal, p 21). In support of this assertion, Wolverine points out that the statute, as originally enacted, did not allow projects to be constructed within limited access highway rights-of-way because the federal government did not allow such construction. Wolverine reminds the Court that the statute was amended in 1989 to allow public utilities to use the highway right of way because of changes in federal law. Wolverine then points to the legislative history of the 1989 amendment. (Wolverine Pipe Line Brief on Appeal, p 23, quoting from the Senate Fiscal Agency Legislative Analysis of HB 4767, October 11, 1989). Wolverine insists that the 1989 bill was intended to allow the Department of

Transportation rather than local governing bodies to permit longitudinal construction within limited access highway rights-of-ways. (Wolverine Pipe Line Brief on Appeal, p 23).

The Senate Fiscal Analysis of the 1989 has no bearing on a proper interpretation of the current text. It corresponds with the language adopted at that time, which allowed construction of projects on limited access highways in subsection (2) but excepted them from coverage under subsection (1). The Michigan Legislature added a provision to permit construction of such projects as long as they satisfied federal standards. See former MCL 247.183, as amended 1989. In 1989, subsection (2) was added to allow construction in limited access highways for the first time. And subsection (1) of the statute provided:

> (1) Telegraph, telephone, power, and other public utility companies, cable television companies, and municipalities are authorized to enter upon, construct, and maintain telegraph, telephone, or power lines, pipe lines, wires, cables, poles, conduits, sewers and like structures upon, over, across, or under any public road, bridge, street, or public place, *except longitudinally within limited access highway rights of way*, and across or under any of the waters in this state, with all necessary erections and fixtures for that purpose. A telegraph, telephone, power, and other public utility company, cable television company, and municipality, before any of this work is commenced, shall first obtain the consent of the governing body of the city, village, or township through or along which these lines and poles are to be constructed and maintained. [Former MCL 247.183(1), amended 1989; emphasis added.]

Thus, the so-called legislative history is consistent with the language of the statute at that time.[4]

But Wolverine pushes its legislative history argument further. (Wolverine Pipe Line's Brief on Appeal, pp 21-26). It insists, not on the basis of any language in the statute, that the absence of reference to a change in the applicability of subsection (1) in the 1994 legislative history means that the textual change should be ignored.

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[4]The prior statute raised constitutional concerns to the extent that its text allowed for a pipe line company to ignore the requirement that it obtain local consent. But this issue was not decided by Michigan appellate courts.

In other words, Wolverine reads the senate and house bill analyses to override the text. Based on a review of 1994 bill analyses, Wolverine asserts that the "sole substantive aim of the 1994 amendment appears to have been promoting economic development by limiting the lease fees the statute could charge utilities seeking to deploy facilities longitudinally in limited access highway rights-of-way." (Wolverine Pipe Line's Brief on Appeal, p 24). Wolverine extrapolates from this bill analysis, which was focused on limits to the lease rates that the state can charge utilities, to conclude that the legislature did not intend to "hinder" access by "subjecting it to the veto of every local community through which a project along a highway might pass." (Wolverine Pipe Line's Brief on Appeal, p 25). Wolverine's argument is not based on the text of the statute. It is not even based on the text of the bill analysis. It is speculation based on the absence of any discussion in a bill analysis that relates to alteration of the statute's text.

Wolverine recognizes that this Court disfavors arguments based on legislative analyses. (Wolverine Pipe Line's Brief on Appeal, p 25). But it ignores the clear import of this Court's teaching by not only relying on a bill analysis—but by relying on the failure of a bill analysis to discuss one aspect of the legislative amendment as reflected in changes to the wording of the provision. In *Frank W. Lynch & Co v Flex Technologies, Inc*, 463 Mich 578; 624 NW2d 180 (2001), this Court explained that "a legislative analysis is a feeble indicator of legislative intent and is therefore a generally unpersuasive tool of statutory construction." 463 Mich at 587. This Court emphasized that the "problem with relying on bill analyses is that they do not necessarily represent the views of even a single legislator." *Id.* at 588 n 7. Instead, "they are prepared by the House and Senate staff." *Id.* Moreover, many "note that they do not constitute an official statement of legislative intent." *Id.* This Court's view has long been accepted by scholars. As

long ago as 1930, Max Radin argued that the presence of a genuine legislative intent in connection with a statute is rare and could not be discovered from the records of legislative proceedings. Max Radin, *Statutory Interpretation*, 43 Harv L R 863-85 (1929-30). See also Gerald C. MacCallum, Jr. *Legislative Intent & Other Essays on Law, Politics, & Morality*, 3-35 (Univ of Wisconsin Press, 1993).

The Senate legislative analysis to the 1994 amendment specifies that it "was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent." Senate Fiscal Agency Analysis of SB 1008, August 3, 1994. (Apx 102a). Despite this, Wolverine relies on it to support an argument that requires this Court to ignore the text because an aspect of the changed wording was not specifically discussed.

Wolverine tries to buttress its approach by suggesting that the 1994 amendment was technical and intended to avoid confusion. (Wolverine Pipe Line Brief on Appeal, p 24). Wolverine suggests that the word "except" might have been read to mean that "MCL 247.183(1) did not allow the utility to use those highways although subsection (2) allowed such use." (Wolverine Pipe Line Brief on Appeal, p 24). But Wolverine makes clear that "[s]uch confusion should have been unnecessary because, ... the plain language of MCL 247.183(2) on its own" allowed utilities "as defined in 23 CFR 645.105 to install facilities longitudinally in limited access highway rights-of-way." (Wolverine Pipe Line Brief on Appeal, p 24, n 8). This strained interpretation provides no basis for reading the word "including" out of the text or ignoring the phrase "subject to subsection (2)." Nothing in the text suggests that the Legislature enacted the amendment to avoid a dispute such as this one. Nor does the legislative history on which Wolverine relies so heavily support this argument. Instead, the text should be read as written. The Court of Appeals did so and its decision should be affirmed.

C. The Notion Of Paramount Jurisdiction Does Not Apply Here.

Wolverine argues that the state's jurisdiction over an interstate highway is paramount here. (Wolverine Pipe Line's Brief on Appeal, pp 26-28). But this argument is fundamentally flawed because it ignores the text of Const 1963, art 7, § 29, which requires local consent as an initial matter. It also incorrectly requires the Court to inflate the paramount jurisdiction doctrine to encompass the initial decision to allow a utility to construct a pipe line within a city's borders as well as later decisions concerning the manner in which the pipes are laid. To do so would be error.

The constitutional provision at issue here reads as follows:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the rights of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government. [Const 1963, art 7, § 29.]

The first sentence governs the initial effort of a public utility to use the highways of a city or to transact local business within a city. The initial clause, which applies here, provides that "[n]o ... corporation ... operating a public utility shall have the right to the use of the highways ... of any ... city ... for ... pipes ... without the consent of the duly constituted authority of the county, township, city or village." This clause specifies that a public utility is obligated to obtain the consent of the duly constituted authority of the city within which the highway exists.[5] The second sentence addresses what happens afterwards. It provides that "[e]xcept as otherwise

[5]The second clause in that sentence requires local consent before a public utility can transact "local business therein without first obtaining a franchise from the" applicable governmental entity.

provided in this constitution the rights of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government." Const 1963, art 7, § 29. In other words, the local unit of government has the right to exercise "reasonable control" of its highways, streets, alleys and public places" even after a public utility is allowed to use them. It is under this sentence, that the Courts have typically discussed "paramount jurisdiction." See e.g. *Jones v Ypsilanti*, 26 Mich App 574; 182 NW2d 795 (1970); *Fostini v Grand Rapids*, 348 Mich 36; 81 NW2d 393 (1957); *1426 Woodward Ave Corp v Wolff*, 312 Mich 352; 20 NW2d 217 (1945). But these decisions do not focus on the initial decision to build; they center around the later decisions governing the manner in which the city can regulate or control what takes place on its streets.

D. The Statute As Read By The City Makes Sense Within The Larger Context.

Local consent is both constitutionally and statutorily required. Const 1963, art 7, § 29; MCL 247.183(1). See also Const 1963, art 7, § 22. Unlike the MPSC, a local government's considerations are far broader than whether or not the State of Michigan can benefit from an additional petroleum pipeline. Although it may consider this factor, a city is also entitled to consider the impact the pipeline will have on its master development plan, and the potential benefit versus harm to the health, safety, and well being of its residents and those it serves. This is why the legislature enacted MCL 247.183(1) and why the courts have reversed orders that allow the MPSC to ignore local and state laws.

In *Detroit Edison Co v Wixom*, 382 Mich 673, 682-683; 172 NW2d 382 (1969), this Court specifically ruled that the MPSC is not precluded from abiding by local and state laws. It held that the Public Service Commission is prohibited from approving the construction of public utilities that violate validly enacted ordinances. Just as argued by appellants in this case, the

Court pointed out that the statutory power of the commission, which allows it to regulate all public utilities, is qualified by the phrase "except as otherwise restricted by law." This phrase, contained in MCL 460.6, makes it clear that the MPSC is not restricted to considering only Act 16, but must abide by all validly enacted local and state laws. Specifically, the Court held:

> The public service commission statute does not vest the commission with authority to determine the routes of high tension lines except as those routes bear upon the "rates, fares, charges, services, rules, conditions of service" or the "formation, operation or direction of such public utilities." The first sentence of CLS 1961, 460.6 (Stat Ann 1965 Cum Supp 22.13[6]), vests the commission "with complete power and jurisdiction to regulate all public utilities in the state ... except as otherwise restricted by law." [Citations omitted.]
>
> The commission is not empowered to assume the role of arbiter between the utility and the city. The company's cost-conscious approach to route selection and the commission's rate-and-service-conscious evaluation of the selected route are too closely aligned.
>
> Public policy is broader than the public's interest in adequate electric service. The commission represents all of the people in their capacity as users of electricity; the city represents some of the people in their multiple concerns as members of a local community. [*Detroit Edison*, at 682.]

In a concurring opinion, Justice Black discussed in greater detail the obligation of the MPSC to follow "all legal requirements" as stated in MCL 460.6 and Rule 601 when he wrote:

> The language of the rule, annexed as it was to the commission's approval of Edison's plans and specifications for construction of this transmission line, is broad enough to exact compliance not only with constitutional and statutory requirements pertaining to local franchises and permits but also with "all legal requirements" of a local nature. The phrase "all legal requirements" certainly would include and require compliance with all validly applicable zoning regulations. [*Detroit Edison*, at 693.]

This is exactly the position argued by the City of Lansing. That is, the MPSC must comply with the consent requirements of MCL 247.183(1) and Const 1963, art 7, § 29 and the zoning requirements of the City's master plan.

The Court in *Detroit Edison*, went on to acknowledge the important differences between the way local governments consider the placement and construction of public utilities, and the criteria employed by the MPSC. As such, it confirmed the legislative rationale for allowing a city to participate in this important decision:

> The commission's interest is in the character of the construction as it relates to the safety of the proposed line, the capacity of the line, the need for the line, and its total relation to the maintenance of electric service to the people of southeastern Michigan. ... The city, on the other hand, has a legitimate though narrow area of concern. It cannot prevent the construction of all high tension lines, any more than it can bar the conduct of any other legitimate enterprise.
>
> But a city does have an interest in the location and route of a high tension electric power line. It is a specific land use which is not compatible with other land uses. It is a land use which characterizes the neighborhood of adjacent real estate. [*Detroit Edison*, *supra* at 682.]

When the City of Lansing considered and denied Wolverine Pipe Line consent to proceed with the project, it did so on the basis of a number of findings:

> (1) the proposal violates the public interest in that the location will have a disparate impact on minority populations above the urban average as it passes through the City of Lansing; (2) the proposal violates the public interest in that it constitutes an unreasonable risk to the groundwater and surface water in and around Lansing and constitutes an unreasonable risk to future drinking water supplies in and around Lansing; (3) the proposal violates the public interest in that it constitutes an unreasonable risk to persons and property in close proximity to the proposed route; and (4) the City lacks adequate resources to mitigate a catastrophic pipeline fracture within the City of Lansing. [Apx 51a.]

These findings fall squarely within the City's public health, safety, and welfare authority as a home-rule city. See Const 1963, art 7, § 29; MCL 117.1 et seq. See generally *Michigan Municipal Law*, pp 3-02-3-12 (ed Steingold & Etter, ICLE 1980). As a first-responder at the local level, the City properly concluded that these are matters of local concern as to which the state jurisdiction over a highway is not paramount. The City of Lansing is responsible for

ensuring the safety of its populace. Its concern regarding risk to the water supply stems not only from its own obligation as a home rule city but from its duty to comply with federal laws.

The City's concern and knowledge was focused on a matter of local concern: the safeguarding of its water supply and populace against terrorist attacks and third party accidents. MPSC Staff witness Mazuchowski explained that third party damage is one of the leading causes of pipeline incidents. (Tr 743; Apx 469b). It is also the leading cause of accidental petroleum product release by volume. (*Id.*) Unintentional damage is much more likely to occur to this pipeline than the statistical averages suggest because state employees will be installing guardrails, signage and engaging in road repair and cleaning the right-of-way (with backhoes) over and immediately next to the pipeline in the I-96 corridor. In addition, dangers are posed by the stress of traffic vibration and accidents. The MPSC concluded that the "threat of a terrorist attack on this facility is no more real or chilling than the threat of a terrorist's hijacking a loaded tanker truck and ramming it into a populated residential business or government building." (MPSC order, p 36; Apx 554b). But this conclusion merely highlights the different focus for the MPSC than for the local government.

Cities are obligated under Title IV of the Public Health Security and Bio Terrorism Preparedness and Response Act of 2002, Pub L 107-99, 116 Stat 594 (June 12, 2002) to conduct vulnerability assessments of community water systems, to prepare or revise emergency response plans, and to certify to the Environmental Protection Agency that an emergency response plan has been completed. The EPA is tasked to provide an overview of threats, methodologies, and strategies for those operating community water systems to consider in addressing these risks. 42 USC 300 et seq. The emergency response plan must include plans, procedures, and identification of equipment that can be implemented in the event of a terrorist or other intentional

attack on the public water systems. It must also include actions, procedures, and identification of equipment that can obviate or lessen the impact of terrorist attacks or other intentional actions on the public health and safety and supply of drinking water provided to communities and individuals. 42 USC 300i-2(b).

A person or group bent on causing serious damage to the largest number of people possible might choose to rupture or ignite a gas pipeline that continuously pumps thousands of gallons a minute along several miles of a densely populated city by hijacking and crashing a tanker filled with a much smaller and finite amount of fuel. The City of Lansing was, and is, justifiably concerned that the pipeline's location in the I-96 corridor would make it easily and completely accessible to persons with terrorist intentions. The pipeline might be buried forty-eight inches deep but it will not be forty-eight inches from the side of the utility trench and a backhoe, which will be used to clean the trench, and could easily dig deep enough to rupture it. In addition, a semi-trailer might easily be driven off the highway and over an exposed pipeline valve to ignite the fuel. A flimsy fence with a "Keep Out" sign will do nothing to prevent such an act. MPSC Staff Member Mazuchowski was not familiar with HB 5511, which was especially designed to protect utility sites such as this one from terrorist attacks. (Tr 763-765; Apx 489b-491b). This bill, which was the precursor to the "Michigan anti-terrorism act," MCL 750.543a-750.543z, addressed emergency response plans, threat assessments and other measures to prevent terrorist activity.

In its expanding effort to reduce the possibility of terrorist attacks, the Michigan Legislature has also amended the Freedom of Information Act, MCL 15.243 et seq. to allow municipalities to exempt from disclosure to the public certain records of information concerning measures designed to protect the security or safety of persons or property of "public words" and

"public water designs" to the extent that those designs relate to the ongoing security measures of a public body and capabilities and plans for responding to a violation of the Michigan anti-terrorism act. MCL 15.243(1)(y).

These laws instituted by the Legislature to reduce or eliminate intentional third party damage to public utilities reflect important matters of local concern. The MPSC's statutory focus is not on these local security concerns. MCL 460.505 specifies the MPSC's proper criteria for granting or denying approval. It provides:

> Sec. 5. In determining the question of public convenience and necessity the commission shall take into consideration the service being rendered by the utility then serving such territory, the investment in such utility, the benefit, if any, to the public in the matter of rates and such other matters as shall be proper and equitable in determining whether or not public convenience and necessity requires the applying utility to serve the territory. Every certificate of public convenience and necessity issued by the commission, under the authority hereby granted, shall describe in detail the territory in which said applicant shall operate and it shall not operate in or serve any other territory under the authority of said certificate. [MCL 460.505.]

The focus is on public convenience and necessity—viewed from the perspective of the state. But MCL 247.183 authorizes the local governments to also determine whether a project should be allowed based on their discretionary decision to grant or deny consent.

Accidental third party damage to a liquid gas petroleum pipeline, as admitted by Wolverine's witnesses, has always been the leading cause of pipeline failure. In these post-9/11 days intentional third-party damage is also an important matter of local concern when considering utility route placement. This new fact of life poses a very real threat depending on the placement of a potentially dangerous utility.

Given these state and federal obligations, local governments are best situated to consider the potential impact of a pipe line on these local health and safety issues. Fortunately, the Michigan Constitution and Michigan statutes afford the City the power and the right to do so.

Wolverine's position is wrong to suggest that the City of Lansing's evaluation of a request for local consent to build a pipeline within areas critical to the water supply is a "mere local concern" as to which the state's authority is paramount. (Wolverine Pipe Line Brief on Appeal, p 26). The City is empowered to grant or deny consent to a pipeline company seeking to build a pipeline through its borders on the basis of its representation "of the people in their multiple concerns as members of a local community." *Detroit Edison*, at 682.

This Court's analysis in *Union Twp v Mount Pleasant*, 381 Mich 82, 85; 158 NW2d 905 (1968) is instructive on these points. There, the city of Mount Pleasant wanted to construct another pipeline to its water source. The city obtained permission from the county road commission to lay a new pipeline within the right-of-way of a county road running through Union Township, but it did not obtain the township's permission. The township filed suit claiming that art 7, § 29 of the Michigan Constitution required the city to seek and obtain its permission to lay the pipeline along a road within its territorial limits. The Court held that both the Constitution of 1963 and the predecessor statute to MCL 247.183 require consent of the township and the county when a utility seeks to lay water pipes on a county road within a township. *Union Twp*, at 84-85. The Court emphasized that the statutory language spoke in general terms of "'public' roads in the city, village, or township through or along which said pipelines, et cetera, are to be constructed." *Union Twp*, at 89. The Court "construe[d] this to mean any public road, including a county road and a state highway, thus manifesting the legislature's intent that townships, for example, retain their right of reasonable control over utility use of public roads passing through their territory, considering the inconvenience to township residents and businesses that generally results from construction within the right-of-way of public roads." *Union Twp*, at 89-90. The Court then underscored its view that local

consent is required by discussing the consistency of this reading with the Constitution. The Court said that "[t]he foregoing interpretation of the statutory provisions is entirely consistent with the last sentence of article 7, § 29 of our Constitution of 1963." *Id.* at 90. The *Union Twp* court's reasoning supports the City's position that the Court should embrace a reading that provides for local consent because it is consistent with the test and avoids creating a conflict with the Constitution.

When reviewing a challenge to the initial decision of whether to grant or deny consent to a public utility seeking to use city streets and highways, this Court has traditionally deferred to the local government's decision. *Michigan Towing Ass'n, Inc v Detroit*, 370 Mich 440; 122 NW2d 709 (1963). In *Michigan Towing Ass'n*, this Court distinguished between use of "streets by the public in the usual way for pleasure or business and as a place or instrumentality for business for private gain." 370 Mich at 454. This Court explained that "as to the former, the power to regulate must be sparingly exercised and only when necessary in the public interest, as to the latter the right to use may be given or withheld." *Id.* This Court applied these principles to uphold a city ordinance prohibiting tow trucks on city highways between specified hours because the city concluded that it posed a danger due to gawking and distraction. *Id.* at 454-455. Despite the towing companies complaint that the ordinance caused inconvenience and additional expense, the Court held that the city was entitled to enforce the ordinance as part of its right to the reasonable control of its streets. In reaching this conclusion, the Court emphasized that the "legislature may not deprive a municipality of the right to reasonable control over its streets, even State trunk lines within its limits, and, to the extent that a statute does so, it is invalid." 370 Mich at 454 quoting *Dearborn v Sugden & Sivier, Inc*, 343 Mich 257; 72 NW2d 185 (1955).

This Court has explained that the language of the predecessor constitutional provision to article 7, § 29 was intended to place public utilities under local control:

> By giving the language of the whole section its ordinary and natural meaning, public utilities were placed under control of local authorities, and the local authorities may control the use of their streets for any purposes whatsoever not inconsistent with State law.

Melconian v Grand Rapids, 218 Mich 397, 402-403; 188 NW 521 (1922). The *Melconian* court elaborated on this by explaining the "streets of the city belong to the public." *Id.* at 404. The court also elaborated on the city's right to give or deny consent because a private utility seeking to use them for public gain is requesting a privilege, rather than a right:

> For ordinary use and general transportation and traffic, they [streets of the city] are free and common to all, and any control sought to be exercised over them must be such as will not defeat or seriously interfere with their enjoyment. The plaintiffs, however, as common carriers have no right to such use for private gain without the consent of the city. Their use is accorded as a mere privilege, and not as a matter of inherent or natural right. [218 Mich at 403-404.]

The *Melconian* court underscored its discussion by noting that "as to the former the power to regulate must be sparingly exercised and only when necessary in the public interest, as to the latter the right to use may be given or withheld." 218 Mich at 404. The court then observed that the control must be reasonable and denial may not be arbitrary, but that "[i]n cases where the public health or safety is involved, this rule has been relaxed and a provision conferring discretionary power has been sustained." *Id.*[6]

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[6]Wolverine has pointed out that the City refused to provide consent to this pipe line project. Wolverine has not challenged that decision in court and the claimed arbitrariness of the decision is not before this Court. The City presents this discussion only to show that this Court has traditionally recognized the right of a city to grant or deny local consent and has traditionally deferred to its decision. The City is confident that should some challenge to its denial be brought, its decision will be approved because it was made to ensure the public health, safety, and welfare.

This Court has also recognized that the city's control of its streets and highways is "not limited to the surface, but includes the space above and beneath the surface." *1426 Woodward Ave Corp v Wolff*, 312 Mich 352, 366; 20 NW2d 217 (1945). This Court has taught that city actions regulating "municipal development, the security of home life, the preservation of a favorable environment in which to rear children, the protection of morals and health, the safeguarding of the economic structure upon which the public good depends, the stabilization of the use and value of property, the attraction of a desirable citizenship and fostering its permanency are within the proper ambit of the police power." *Id.* at 370. This Court also made clear that, in enacting the predecessor provision to Const 1963, art 7, § 29, the "people ... took from the legislature certain of its former powers over municipalities and reserved to them reasonable control over their streets...." *Id.* In the Court's words, "[t]his is an expansion of the powers of municipalities rather than in derogation of them." *Id.* quoting *People v McGraw*, 184 Mich 233; 150 NW 836 (1915).

These principles support the City of Lansing's position and an affirmance of the Court of Appeals' decision insofar as it held that Wolverine is obligated to obtain local consent and a reversal insofar as it ruled that the MPSC need not enforce its rule requiring Wolverine to demonstrate it obtained local consent as part of its petition.

RELIEF

WHEREFORE, Defendants-Appellees and Cross-Appellants, the Mayor of the City of Lansing and the City of Lansing respectfully request that this Court affirm the Court of Appeals in part and reverse it in part, vacate the decision and order of the MPSC, and rule that Wolverine Pipe Line Company is obligated to obtain local consent before commencing construction, and is obligated to demonstrate that it has obtained the necessary local consent with its application for MPSC approval, that the failure to do so mandated a denial from the MPSC, and that the Mayor of the City of Lansing and the City of Lansing be provided all relief in law and equity to which they are entitled.

Respectfully submitted,

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DATED: November 6, 2003

STATE OF MICHIGAN

IN THE SUPREME COURT

MAYOR OF THE CITY OF LANSING,
CITY OF LANSING & INGHAM COUNTY
COMMISSIONER LISA DEDDEN,

Appellees/Cross-Appellants,

-vs-

MICHIGAN PUBLIC SERVICE COMMISSION
& WOLVERINE PIPE LINE COMPANY,

Appellants/Cross-Appellees.
_____/

Supreme Court No. 124136

Court of Appeals No. 243182

MPSC Case No. U-13225

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

CHRISTINE M. WARNEZ, states that on November 6, 2003, a copy of the Mayor of the City of Lansing & City of Lansing Appellees & Cross-Appellants' Brief on Appeal and Appendix, was served on ALBERT ERNST, Attorney for Wolverine, 124 W. Allegan, Lansing, MI 48933; PAUL O'KONSKI, Of Counsel for Wolverine, Law Department, P.O. Box 2220, Houston, TX 77252-2220; DAVID A. VOGES, Assistant Attorneys General, Public Service Division, 6545 Mercantile Way, Suite 15, Lansing, MI 48911; LISA DEDDEN, In pro per, Ingham County Commissioner, District 10, 1925 Bowker Drive, Lansing, MI 48911, by depositing same in the United States Mail with postage fully prepaid.

CHRISTINE M. WARNEZ

Subscribed and sworn to before me
November 6, 2003.

Christine Borghi
Notary Public, Wayne County, MI
My Commission Expires 9/2/2005
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